EDITOR'S NOTE

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85-1326

Appendix

Supreme Court, U.S.
FILED
FEB 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

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STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH

JUDICIAL CIRCUIT

COUNTY OF MC LEAN

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	]	
v	]	No. 83 CF 329
PETER J. ANDING, Defendant,	]	

MOTION FOR NEW TRIAL

Comes now the Defendant, PETER J. ANDING, and moves the Court to enter an Order granting him a new trial in the above-entitled cause and as grounds for so moving alleges and represents as follows:

1. That the verdict is contrary to the law and the evidence.

2. That Defendant in the above-entitled cause was denied procedural and substantive due process in connection with the defense of his cause in that his interests before the court were not adequately represented by his attorney.

3. That Defendant throughtout the legal proceedings herein described was denied his right to effective assistance of counsel

under the sixth amendment of the U.S. Constitution.

4. That throughout the proceedings herein Defendant was denied due process and the effective assistance of counsel in one or more of the following regards:

a. That he retained a counsel, George C. Howard, of Chicago, Illinois after his arraignment upon the above-entitled case and after he was initially appointed a public defender to represent him in the above-entitled cuase.

b. That at the time of his arraignment even though Defendant had hired George C. Howard, Attorney at Law, said counsel did not appear for the arraignment and Defendant was represented by the public defender who at that time filed a Motion to Withdraw and was granted leave to withdraw simultaneous with the arraignment.

c. That no pre-trial motions of any nature were filed on behalf on the Defendant by private counsel. Private counsel made no pre-trial appearances either in writing or in person for Defendant.

d. That the only pre-trial motion filed on behalf of Defendant to protect his rights and to obtain pre-trial information was a standard form discovery motion filed by the public defender's office which was allowed

e. That after the withdrawal of public defender and the entry of appearance in writing of private counsel, private counsel on court appearances wherein the Defendant's appearance was required continued to contact and communicate with the public defender's office, asking the public defender or an assistant therefrom to stand in for him as a substitute counsel for Defendant at court appearances.

f. That legitimate pre-trial issues might, should or could have been raised on behalf on Defendant, especially suppression of the confessions, admissions, or statements of defendant and/suppression of highly questionable identification procedures involving alleged and purported identification of the Defendant by minor children, and children of tender years under questionable

and suggestive circumstances, and even though both pre-trial police reports and trial evidence suggested that said identification motions might well have been called for, none were discussed with the Defendant, apparently contemplated, filed on behalf of Defendant or ever heard prior to trial.

g. That no pre-trial negotiations were discussed at any time by counsel with Defendant or Defendant's parents concerning plea negotiations, plea bargaining, polygraph tests and no representations or discussions were made as to such pre-trial matters as to legal counsel with the Defendant.

h. That Defendant and his parents had virtually no pre-trial access to retained counsel except on the eve of trial and that the only appearance made by privately retained counsel on behalf of Defendant were to journey to the site of the trial and to conduct a jury trial which took approximately two days.

i. That at all times during pre-trial

and during the trial the counsel indicated strongly to Defendant and the Defendant's parents that he believed that the evidence was insufficient to convict the Defendant and that the Defendant would not be convicted and exonerated.

j. That post-verdict, the Defendant's trial counsel filed no post-trial motion of any kind preserving any legal or evidentiary rulings, errors or matters for the record and that said counsel was the only person in a position to make said motion as he was trial counsel.

k. That post-verdict when Defendant and Defendant's parents indicated that they wish to engage additional counsel for purposes of contemplating appeal, privately retained counsel indicated to Defendant and to his parents that counsel's file would be closed and said counsel in addition to filing no post-trial motion indicated an unwillingness to appear for Defendant at any post-trial proceeding sentencing or otherwise even though he is still the attorney of record in the above-entitled proceeding.

Harold M. Jennings

STATE OF ILLINOIS]
SS
COUNTY OF MC LEAN]

PETER J. ANDING, being first duly sworn on oath deposes and states that he is the Defendant in the above-entitled cause, that he has read the foregoing Motion for New Trial and the contents contained therein are true to the best of his knowledge, information and belief.

Peter J. Anding

Subscribed and sworn to before me this 25th day of July, 1984.

Alice Faye Smalley

Notary Public

STATE OF ILLINOIS]
SS
COUNTY OF MC LEAN]

JAMES ANDING, being first duly sworn on oath deposes and states that he is the father of the Defendant in the above-entitled cause, that he has read the foregoing Motion for New Trial and the contents contained therein are true to the best of his knowledge information and belied.

James H. Anding

Subscribed and sworn to before me this 25 day of July, 1984.

Alice Faye Smalley
Notary Public

STATE OF ILLINOIS]
SS
COUNTY OF MC LEAN]

HENRINE ANDING, being first duly sworn on oath deposes and states that she is the mother of the Defendant in the above-entitled cuase, that she has read the foregoing Motion for New Trial and the contents contained there are true to the best of her knowledge, information and belief.

Henrine Anding

Subscribed and sworn to before me this 25th day of July, 1984.

Alice Faye Smalley

Notary Public

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
217/782-2035

December 4, 1985

Mr. Harold M. Jennings
Attorney at Law
109 W. Jefferson
Bloomington, IL 61701

62344

No. 62344 - Peoples State of Illinois,
Respondent,

v

Peter J. Anding,
Petitioner,

Leave to appeal, Appellate Court, Fourth District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 27, 1985.

No 62344

IN THE

SUPREME COURT OF ILLINOIS

People State of Illinois,	]	
Respondent,	]	Appeal from Appellate Court Fourth District 4-84-0587 83 CF 329
vs	]	
Peter J. Anding,	]	
Petitioner,	]	

PROPOSED ORDER

This matter has come for consideration upon the motion of petitioner to stay and/or recall the mandate of this Court pending application for Certiorari in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of an application for Certiorari or the expiration of the period within which said application may be filed. If Certiorari is applied for, the mandate of this Court shall, upon proof of such application being made by affidavit filed with the Clerk of this Court, be stayed pending resolution of the United States Supreme Court of such

application. If no such affidavit is filed the mandate shall, without further order, issue upon the expiration of the time within which Certiorari may be sought.

Ben Miller

Entered Dec. 30, 1985

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

SUPREME COURT BUILDING

SPRINGFIELD, 62706

DATE: July 18, 1985

RE: People v Anding,
Peter J.
General No. 4-84-0587
McLean 83 CF 329

TO COUNSEL:

The court today denied the petition for rehearing filed in above entitled cause.

The mandate of this court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court [Rule 368 (b)] is filed in this Court.

DARRYL PRATSCHER
Clerk
Appellate Court
Fourth District

DP:mcb

TO: Harold M. Jennings
Attorney at Law
109 W. Jefferson
Bloomington, IL 61701

Ronald C. Dozier, State's Attorney, McLean County

Robert J. Biderman, Deputy Director, S.A.A.S.C.
Rebecca L. White
Staff Attorney

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62706

COUNSEL WILL PLEASE TAKE NOTE:

If you intent to appeal to the Supreme Court we request that you file your affidavit of intent in 28 days from the date of this judgment.
[Rule 368(b)]

A petition for rehearing must be filed within 21 days (by July 11, 1985) from the date of this judgment [Rule 367(a)]

IF NEITHER FILED our mandate will issue to the Circuit Clerk on July 18, 1985.

IF PETITION FOR REHEARING IS FILED our mandate will issue 7 days after the order, if denied, if no affidavit of intent is filed within those 7 days.

THIS TIME SCHEDULE DOES NOT SHORTEN THE TIME FOR FILING IN THE SUPREME COURT! It does prevent recall of a mandate.

We solicit your cooperation in this schedule so that we may expedite our case load and issue our mandates as soon as possible.

Darryl Pratscher
Clerk, Appellate Court
Fourth District

RULE 23 ORDER FILED: JUNE 20, 1985

JUSTICES:

HONORABLE DONALD W. MORTHLAND, J.

HONORABLE JOHN T. McCULLOUGH, J.

HONORABLE HAROLD F. TRAPP, J.

Concurring

Dissenting

NO. 4-84-0587

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v PETER J. ANDING, Defendant-Appellant,

Appeal from Circuit Court County of McLean No. 83 CF 329

Honorable James A. Knecht, Judge Presiding.

FOR APPELLANT

Harold M. Jennings
Attorney at Law
109 W. Jefferson
Bloomington, IL 61701

FOR APPELLEE

Ronald C. Dozier
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151 Bruns Lane, Suite 103
Springfield, IL 62702
Rebecca L. White
Staff Attorney

NO. 4-84-0587

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	]	
v	]	Appeal from Circuit Court
PETER J. ANDING, Defendant-Appellant,	]	County of McLean No. 83 CF 329
		Honorable James A. Knecht, Judge Presiding

JUSTICE MORTHLAND delivered the order the Court:

Following a jury trial, defendant , Peter J. Anding, was convicted of deviate sexual assault, indecent liberties with a child and armed violence. (Ill. Rev Stat. 1983, ch.38, pars. 11-3, 11-4, 33A-2.) The court found that the indecent liberties conviction merged into the deviate sexual assault conviction and sentenced the defendant to 6 years for the deviate sexual assault and armed robbery convictions. On appeal, the defendant contends that (1) he was denied effective assistance of couns

and (2) his guilt was not proved beyond a reasonable doubt.

The evidence adduced at trial established the following. At about 7 p.m. on October 21, 1983, Brian VanHorn, a high school sophomore, was changing for swim practice in the locker room of Metcalf School. He noticed a black male, whom he later identified as the defendant, Peter J. Anding, putting supplies from the janitor's closet into the restrooms. VanHorn testified that the defendant grabbed him by the arm, pulled out a knife which he placed against VanHorn's lower back and pushed him into the janitor's closet. VanHorn testified that the defendant told him if he did not do exactly what he told him he would stab him and throw him down the stairway. The defendant performed an act of oral sex on VanHorn and kissed VanHorn on the buttocks. Before the defendant left, he offered VanHorn $20 and told him not to tell anyone of the incident.

VanHorn waited about two days before he told his father of the incident. He described his assailant to the police as being about 5 feet 10 or 11 inches in height weighing 180 pounds, having a medium complexion with a large blackhead on his left cheekbone and wearing a pair of high-top, leather, Nike basketball shoes with a silver emblem.

On October 24, 1983, the defendant, a sophomore at Illinois State University and a student manager of the basketball team, was arrested by the ISU police in the locker room of Metcalf School. At the time of his arrest, the defendant carried a knife. This knife,however, was not the knife that was used against Brian VanHorn. Among the items recovered from the defendant's locker were a pair of expensive, high-top, leather, Nike basketball shoes with a blue emblem . Some of the keys in the defendant's possession opened one of the exterior doors to Metcalf School, the girls' equipment room, and the girls' locker room. At the time of

his arrest, the defendant told Officer Knapp that he had obtained the keys at Metcalf from an unidentified male sometime last year.

Scott Shanahan, also a member of the swim team, testified that on October 19, 1983, when he went into the locker room to change, the defendant was in the locker room. The defendant asked Shanahan if he could see his penis and when Shanahan refused, he first offered him $10 and the $20. Prior to the incident, Shanahan testified that he had observed the defendant in the locker room for several evenings.

Maria Hirsch, a janitor at Metcalf School, testified that on the evening of October 20, 1983, at about 10 p.m., the defendant accompanied by a male and female, knocked on the door of the school. The defendant told Hirsch that his boss had forgotten something and he went back to the locker room. Hirsch assumed that the defendant worked at the school because he had some keys in his hands and because she had

seen him several times during the preceeding two weeks at about 8 p.m. in the evenings.

John Thomas Almeida, another member of the swim team, testified that he saw the defendant in the locker room of Metcalf School several times during the week of October 17, 1983. One evening that week, during swim practice, he discovered a knife on the floor in one of the restroom stalls in the locker room. The defendant claimed the knife from Almeida. Almeida identified the knife he had found as being the same one which was found on the defendar at the time of his arrest.

Several members of the Illinois State University basketball team testified on behalf of the defendant. One of the defendants' roommates testified that on October 21, 1983, he, along with the defendant and several other members of the team, ate dinner at the dormitory at about 5:30p.m.

He testified that after dinner, the defendant left with William Anderson in his car and that when the roommate returned to the dormitory at about 8 p.m. the defendant was there getting his hair cut.

William Anderson testified that, after eating dinner on October 21, 1983, he drove another teammate home and at about 7:10 or 7:15 p.m., dropped the defendant off at the radio station where he worked. The radio station is located across from Metcalf School.

Michelle Hildreth, an ISU student and one of the directors of the campus radio station, testified that she saw defendant at the radio station on October 21, 1983, at about 7 p.m. or a few minutes thereafter. She testified that the defendant remained at the station for 15 minutes to half and hour.

The defendant denied committing the sexual assault upon Brian VanHorn. He

testified that about one month prior to his arrest he had obtained the keys to Metcalf School from a janitor who told him to lock up when he finished playing basketball. He also testified that he carried a knife in order to open bundles of newspapers at the basketball office where he worked.

On April 19, 1984, the jury returned a verdict finding the defendant guilty as charged. On July 25, 1984, the defendant, through new counsel, filed a motion for a new trial, The motion was denied and the defendant was sentenced to a 6-year term of imprisonment.

The defendant contends that he was denied effective assistance of counsel during the preliminary stages of the proceedings. Although the defendant concedes that he received adequate representation once the trial began, he asserts that his trial counsel was incompetent in failing to attend his hearing before the Illinois State University judicial board. The defen-

dant likens that hearing to a dress rehearsal for his trial and claims that his attorney's failure to attend the hearing and interview the witnesses prior to trial demonstrates his incompetence.

Although the failure to investigate witnesses may constitute actual incompetence (People v Greer 1980), 79 Ill. 2d 103, 402 N.E. 2d 203), the defendant must demonstrate a prejudicial effect without the outcome of the trial would probably have been different. As the court stated in People v Young (1983), 115 Ill. App. 3d 455, 467, 450 N.E. 2d 947,957, "[c] onjecture does not serve as a basis for a demonstration of ineffective assistance of counsel and where a defendant fails to indicate the nature of the omitted testimony, he has failed to prove the requiste prejudice resulting from the omission." Here, the defendant fails to meet thi burden. He does not suggest any favorable testimony which his counsel failed to present and, in fact, admits that his counsel represented him competently at

trial.

In addition, the defendant's parents testified that they met with their son's trial attorney several times prior to trial and that the defendant had met with him on at least one of these occasions. We note that the defendant's trial attorney had arranged to have other counsel appear on behalf of the defendant at the pretrial proceedings.

The defendant also contends that the failure of his attorney to file a pretrial motion to suppress allegedly suggestive photographic identification procedures constitutes ineffective assistance as counsel. The defendant contends that the State improperly showed the victim and othe witnesses six photographs at a time when defendant was in custody. Absent extenuating circumstances, the use of photograph in identification procedures is generally dissapproved when the subject is in custody and a lineup would be feasible. (People v Kubat (1983), 94 Ill. 2d 437,447,N.E.ed 2

People v Jackson (1973), 54 Ill. 2d 143, 295 N.E. 2d 462). However, even assuming that the pretrial identification procedure was improper, where the witness' in-court identification has a sufficiently independent basis any impropriety in the pretrial identification procedures will not be considered to have affected the later identification. (Kubat; Jackson.) A proper in-court identification will sustain a defendant's conviction. People v Williams (1975), 60 Ill. 2d 1, 322 N.E. 2d 819.

Under the test set forth in Manson v Brathwaite (1977), 432 U.S. 98, 53 L. Ed. 2d 140, 97 S.Ct. 2243, we find that the victim's and the witnesses' in-court identifications of the defendant were reliable. VanHorn testified that he viewed the defendant face-to-face in a well-lit locker room for approximately 10 minutes. He described his assailant as having a blackhead on his left cheekbone. The defendant has a chicken pox scar on his left cheekbone. Although the description of the defendant given by

VanHorn differed by 3 inches in height and 2 pounds in weight, considering the age of the victim we view these discrepancies to be minor. Scott Shanahan testified that he observed the defendant in the locker room on several occasions. Similarly, Maria Hirsch tesified that she had seen the defendant in Metcalf School many times. We conclude that a motion to suppress would not have been successful and therefore the defendant's attorney was not incompetent for failing to make such a motion.

The defendant also contends that his trial counsel's failure to file a post-trial motion for a new trial constitutes incompetence. Failure to file a post-trial motion does not amount to ineffective assistance of counsel, however where no substantial grounds for a new trial exist. (People v Ortiz (1981). 96 Ill. App. 3d 497,421 N.E. 2d 556.) The record in the present case does not reveal any substantial issues which could have been raised.

Defendant, however, relies on People v Williams (1972), 93 Ill. 2d 309,444 N.E. 2d 136, to support his contention that he was denied effective assistance of counsel. In Williams, in view of the unique circumstances presented in the case, the court abandoned the established test for determining competence of counsel. At the time of the defendant's trial, defendant's counsel was simultaneously representing two other co-defendants for capital murder before two juries and was the subject of disciplinary proceedings. In granting the defendant a new trial, the court noted that the unique facts and circumstances of the case "[would rarely, if ever, be duplicated." 93 Ill. 2d 309, 325, 444 N.E. 2d 136, 143.

We do not find the Williams case analoogous to the case at bar. None of the special facts and circumstances which warranted reversal in that case are present here. Considering the totality of the conduct of defendant's counsel, we conclude that the defendant received competent representation.

The defendant's contention that the evidence was insufficient to prove his guilt beyond a reasonable doubt is based upo the victim's unclear and unconvincing identification of the defendant and the defendant's corroborated alibi defense. It is well settled that where a conviction for indecent liberties rests upon the victim's testimony and the defendant denies the charg the victim' testimony must be clear and convincing or substantially corroborated. People v Morgan (1977), 69 Ill. 2d 200, 370 N.E. 2d 1063; People v Kolden (1962), 25 Ill 2d 327, 185 N.E. 2d 170.

In our opinion, the testimony of Brian VanHorn was clear and convincing and was sufficient to support the defendant's convictions. Furthermore, VanHorn's identifica tion testimony was substantially corroborate As we previously noted, the discrepancies in VanHorn's identification testimony were minor in character and go only to the weight to be afforded his testimony by the trier of fact. (See People v Britton (1980), 80

Ill. App. 3d 482, 400 N.E. 2d 33.) The credibility and weight to be given to the testimony of the defendant's alibi witnesses is a matter for the trier of fact to determine and its judgment will not be disturbed on appeal unless palpably erroneous. (People v. Davis (1977), 53 Ill. App. 3d 424, 368 N.E. 2d 721.) We find that the evidence was sufficient for the jury to determine that the defendant was guilty of the offenses charged beyond a reasonable doubt.

For the foregoing reasons the judgment of the circuit court of McLean County is affirmed.

Affirmed.

McCULLOUGH and TRAPP, JJ., concur.